

August 2012

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### Recommended Citation

Thomas Willging and Emery Lee III, *CLASS CERTIFICATION AND CLASS SETTLEMENT: FINDINGS FROM FEDERAL QUESTION CASES, 2003–2007*, 80 U. Cin. L. Rev. (2012)

Available at: <https://scholarship.law.uc.edu/uclr/vol80/iss2/3>

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## CLASS CERTIFICATION AND CLASS SETTLEMENT: FINDINGS FROM FEDERAL QUESTION CASES, 2003–2007

Thomas E. Willging\* & Emery G. Lee III\*\*

*No two cases were alike.*<sup>1</sup>

### INTRODUCTION

Securities<sup>2</sup> and mass torts<sup>3</sup> dominate the class action literature. But securities and mass tort class actions do not represent the majority of class actions filed in or removed to federal court. In *Class Action Dilemmas*, the Rand Institute for Civil Justice reported that, for the period 1995–1996, securities class actions accounted for 19% of class actions in reported cases and 17% of class actions reported in the general press.<sup>4</sup> Tort class actions, a category larger than mass torts, accounted for 9% and 14% respectively.<sup>5</sup> Added together, securities and tort class actions accounted for between 28% and 31% of class actions identified using these measures. A 2008 Federal Judicial Center (FJC) report found that in the first half of 2007, securities class actions accounted for 3.6% of all class action filings and removals in federal court, while tort class actions accounted for just 2.7%.<sup>6</sup>

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\*\* Senior Researcher, Federal Judicial Center. Institutional affiliation is provided for identification purposes only. The views expressed in this Article represent the views of the authors and do not represent the views or positions of the Federal Judicial Center or any other entity in the judicial branch. The authors gratefully acknowledge the work and comments of several colleagues: George Cort, Laural Hooper, Marie Leary, Angelia Levy, Dean Miletich, Robert Niemic, and Shelia Thorpe.

1. JAY TIDMARSH, MASS TORT SETTLEMENT CLASS ACTIONS: FIVE CASE STUDIES 1 (1998).

2. See, e.g., John C. Coffee, Jr., *Reforming the Security Class Action: An Essay on Deterrence and its Implementation*, 106 COLUM. L. REV. 1534, 1539–1540 (2006) (stating that security class actions are “the 800-pound gorilla that dominates and overshadows other forms of class actions”).

3. See, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1344 (1995). The literature on mass tort class actions includes a great deal of work either conducted by or published by the Federal Judicial Center. See, e.g., TIDMARSH, *supra* note 1; S. ELIZABETH GIBSON, CASE STUDIES OF MASS TORT LIMITED FUND CLASS ACTION SETTLEMENTS & BANKRUPTCY REORGANIZATIONS (Federal Judicial Center 2000); THOMAS WILLGING, ET AL., INDIVIDUAL CHARACTERISTICS OF MASS TORTS CASE CONGREGATIONS: A REPORT TO THE MASS TORTS WORKING GROUP app. D (Federal Judicial Center 1999).

4. DEBORAH R. HENSLER, ET AL., CLASS ACTION DILEMMAS 53 fig. 3-1 (2000). Not surprisingly, securities class actions were much more common in the business press, accounting for 39 percent of all class actions in business reporting. *Id.*

5. *Id.*

6. EMERY G. LEE III & THOMAS E. WILLGING, THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: FOURTH INTERIM REPORT TO THE JUDICIAL CONFERENCE

There are certainly other ways to gauge the importance of categories of class actions other than by news items or filings. One might look to the number of settlements that result from the filings—in that respect, securities class actions seem particularly important. Securities class actions clearly represent the plurality of class settlements in federal court in recent years, about 37% of class settlements in 2006–2007.<sup>7</sup> Or one might look to the number of claimants affected by the class certification decision. Mass tort cases especially, whether certified as classes or not, may represent the aggregation of tens of thousands of claimants in a single proceeding, often in a multidistrict litigation.<sup>8</sup>

But there is much class action activity in the federal courts beyond the securities and mass tort class actions. It is to that often-overlooked class action activity to which we turn.

The findings presented in this Article are the result of research originally requested by the Judicial Conference Advisory Committee on Civil Rules (Rules Committee) in 2005. Prior to passage of the Class Action Fairness Act of 2005 (CAFA)—effective February 18, 2005—there was concern that CAFA might overwhelm the federal courts with class actions removed from the state courts.<sup>9</sup> A large part of the CAFA research performed for the Rules Committee focused on the impact of CAFA on filings in and removals to federal courts, post-CAFA.<sup>10</sup> That research was concluded with the April 2008 publication of a report on filings and removals in the federal courts from July 1, 2001 through June 30, 2007.<sup>11</sup>

The original design of the study also envisioned a second phase of research beyond merely counting class actions filed in or removed to federal court; to “measure CAFA’s impact on litigation activity and judicial rulings in class actions in the federal courts.”<sup>12</sup> Because of

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ADVISORY COMMITTEE ON CIVIL RULES 3–5 (2008) [hereinafter FOURTH REPORT]. Note, however, that these estimates include Fair Labor Standard Act opt-in class actions in the denominator and count MDL and other consolidations as a single case.

7. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 818 tab. 1 (2010) [hereinafter *Empirical Study*].

8. See Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 KAN. L. REV. 775 (2010) [hereinafter *Consolidations*].

9. For a discussion of predictions of CAFA’s impact and the evolving judicial branch positions with regard to CAFA, see Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PENN. L. REV. 1723, 1725–33, 1740–42 (2008) [hereinafter *Impact of CAFA*].

10. See *id.* at 1747–49 (discussing how to determine CAFA’s impact).

11. FOURTH REPORT, *supra* note 6.

12. Emery G. Lee III & Thomas E. Willging, *Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings From Phase Two’s Pre-CAFA Sample of Diversity Class Actions*, 256 F.R.D. 218 (2009) [hereinafter *Preliminary Findings*].

CAFA's potential impact on the workload of the federal courts, it made sense for the first phase to focus on class actions based on diversity of citizenship jurisdiction. CAFA both permitted aggregation of individual claims to meet the amount-in-controversy requirement—for aggregate claims in excess of \$5,000,000—and lowered the diversity requirement from complete diversity between named parties to minimal diversity.<sup>13</sup>

In collecting the class action data, however, the study was not limited to acquiring information on diversity class actions. CAFA might, the Rules Committee surmised, change the types of claims litigants assert in federal question cases. As a result, a large amount of data was gathered on a sample of federal question class actions filed in or removed to the federal courts in the two years before and the two years after CAFA's effective date. In what follows, however, we will ignore the question of CAFA's impact on federal-question class actions and treat the sample as a four-year filing cohort. Our purpose is to provide some descriptive information on the rate of class certification and the rate of class settlement in the sampled cases and, where appropriate, to generalize from the sample to the population of federal-question class actions.

Civil rights, employment discrimination, contracts and consumer fraud, antitrust, civil RICO, and ERISA claims comprise the bulk of the sampled cases. The sampled cases include very few tort cases, without a single products liability multidistrict litigation included among the sampled federal question cases; in the study period, all such cases were based on diversity jurisdiction. Moreover, the second phase of the study excluded securities class actions. The reason for this was simple: we needed to devise some means of reducing the burden of the data collection—especially given that the focus of the overall project was diversity class actions—and it made sense to exclude securities class actions, the category which has been written about the most.<sup>14</sup> In this symposium issue alone, for example, there is an empirical article on securities class actions.<sup>15</sup> Given resource constraints, we determined to study other federal question class action settlements.

Part I sets out some of the empirical findings of our research into federal question class actions, beginning with class actions removed from the state courts, then moving on to class actions initially filed in federal court. After a brief digression into Fair Labor Standards Act

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13. See *Impact of CAFA*, supra note 9, at 1733–35.

14. See Coffee, *Reforming the Security Class Action*, supra note 3; Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991).

15. Jennifer J. Johnson, *Securities Class Actions in State Court*, 80 U. CIN. L. REV. 349 (2011)

(FLSA) collective actions, Part I concludes with some information about case processing times. Part II then puts the findings presented in Part I in historical and scholarly context. The first subpart of Part II discusses the changing law of the class action. The second subpart compares the present findings to the handful of comparable studies.

## I. EMPIRICAL FINDINGS

In what follows, the term “class action” means any case filed in or removed to federal court in which the plaintiff(s) made class allegations at any point in the litigation; it is not limited to cases in which a class was certified.<sup>16</sup> Indeed, as we will see shortly, motions for class certification are never filed in many cases filed as proposed class actions. We prefer to treat removals and original proceedings separately because removal cases have a possible outcome—remand to state court—that is not available for original proceedings, thus making direct comparison difficult. Part I.A addresses federal question removals and Part I.B addresses federal question original proceedings.

### A. Removals

Figure 1 presents a flowchart illustrating the class certification and settlement activity in the 297 sampled federal question class actions removed to federal court during the study period. About half of the federal question removal cases are classified in the civil rights or employment discrimination category. The next largest category is labor, often state-law labor claims, but including some ERISA claims.

The first decision point with removal cases is whether the case will stay in federal court or whether it will be remanded to state court. As Figure 1 shows, the remand rate for the removed class actions was 32.3%—96 of the 297 removed class actions were remanded to state court. Interestingly, the remand rate was very high considering the removed cases in which a motion to remand was actually filed. Fully 71.3% of removed cases in which a remand motion was filed were in fact remanded to state court. For example, in *Kronmeyer v. U.S. National Bank*,<sup>17</sup> the defendant bank removed the case from the Circuit Court of Madison County, Illinois, arguing that plaintiff’s claims—specifically that the bank committed “wrongful dishonor”

16. Cf. FOURTH REPORT, *supra* note 6, at 2.

17. *Kronmeyer v. U.S. Nat’l Bank Assn.*, No. 3:4cv250 (S.D. Ill., removed April 12, 2004; remanded August 3, 2004).

under Illinois state law<sup>18</sup> when it charged customers without an account with the bank a fee for cashing checks—was preempted by the National Bank Act, 12 U.S.C. § 21 (NBA). Plaintiffs moved to remand and the court granted the motion, holding that plaintiffs' claims were not completely preempted because no remedy for such a claim exists under the NBA, distinguishing *Beneficial National Bank v. Anderson*.<sup>19</sup>

Similarly, in *Donegan v. WMC Mortgage Corp.*,<sup>20</sup> defendant residential mortgage lender and servicer removed a class action that alleged it had collected a prepayment penalty from plaintiffs and the class in violation of Alabama law. Defendants argued that the loan was made under federal legal standards. They contended that the federal Alternative Mortgage Transactions Parity Act<sup>21</sup> completely preempted Alabama law on the subject. Defendant also argued that complete diversity existed among the parties and the disgorgement remedy plaintiff sought should be valued at more than \$75,000. More than ten months after removal, the district, rejected both arguments and held that any preemption was not complete. The court further held that the amount in controversy was not satisfied and remanded the case.

But in some cases, remand was more consensual and less litigated. For example, in *O'Neill v. Trident Land Transfer Co. of New Jersey, L.P.*,<sup>22</sup> defendants removed an action alleging violations of the Real Estate Settlement Practices Act (RESPA),<sup>23</sup> and New Jersey's Consumer Protection Act. The claims stemmed from the practice of defendant real estate agents charging a \$25 courier fee included on the HUD-1 closing report. After more than eight months, with little federal docket activity, the parties filed, and the district judge signed, a stipulation and consent order remanding the case to New Jersey Superior Court. The stipulation recited the prospect of settlement under the state statute and referred to the availability of settlement provisions in New Jersey.

Of the approximately two-thirds of removed class actions not remanded to state court, a motion to certify a litigation class—or, as the figure denotes, a “contested” motion for class certification—was filed in 30.8% cases, 62 out of 201 times. To put it the other way, in

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18. 810 ILL. COMP. STAT. 5/4-402 (2010).

19. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003).

20. *Donegan v. WMC Mortg. Corp.*, No. 3:3cv1053-T (M.D. Ala., Oct. 22, 2003) (order).

21. Alternative Mortgage Transactions Parity Act, 12 U.S.C. § 3801 (2006).

22. *O'Neill v. Trident Land Transfer Co.*, No. 06-CV-2727 (D.N.J. June 16, 2006) (stipulation and consent order at 2).

23. Real Estate Settlement Procedures Act, 12 U.S.C. § 2607(b) (2006).

almost 70% (139 out of 201 cases) no contested motion to certify a class was ever filed. Of these cases, a small number resulted in class settlement, discussed below. The plaintiff voluntarily dismissed most of the remaining cases before filing a motion for class certification. Voluntary dismissal may signal that an individual settlement of the claims was reached by the parties, although this is often not apparent from the docket records alone.<sup>24</sup>

In the 62 cases in which a contested motion for class certification was filed, at least one contested motion was granted in sixteen cases, or 25.8% of cases. This does not necessarily mean that one or more motions for class certification were denied in the remaining 74.2% of cases in which a motion was filed. In a number of cases, the contested motion was rendered moot when the parties reached a settlement agreement and filed a motion to certify a settlement class. “No court action” was a relatively common outcome for contested motions. Also worth noting is that the mean time from the filing of the motion to a court ruling was 4.3 months in the removal cases. Thus, even after a motion was filed, there was time for the parties to continue to discuss settlement.

As shown in Figure 1, in the sixteen cases in which one or more contested motion for class certification was granted, twelve, or 75% of the time, they resulted in a class settlement. The remaining four cases did not. When a litigation class has been certified but does not result in a class settlement, the outcomes tend to be either a summary or trial judgment for the defendants. However, in one of these four cases the class certification ruling was overturned after the defendants appealed using a Rule 23(f) motion.

Of the 46 cases in which one or more contested motions for class certification was filed but not granted, seven, or 15.2%, resulted in a class settlement without a favorable ruling on a motion for class certification. The remaining 39 cases, or 84.8%, did not. In other words, we did not find many class settlements among the removed cases in cases in which the court considered but did not grant motions to certify a litigation class.

It is interesting that sixteen cases resulted in a class settlement without the plaintiffs filing a contested motion for class certification. In other words, more than half of the settlements had no motion to

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24. For a discussion of voluntary dismissal cases, see *Preliminary Findings*, *supra* note 12, at 223. In that Article, addressing a sample of class actions based on diversity jurisdiction, we wrote: “The voluntary dismissal cases present something of a mystery. They make up the largest group of cases in the pre-CAFA sample and represent a majority of non-remanded class action cases . . . . [N]either plaintiffs nor defendants seem to have pursued them very aggressively . . . .” *Id.* Of course, voluntary dismissals make up a relatively large portion of all federal cases.

certify a class. Those sixteen cases represent 11.5% of the 139 cases in which a contested motion was never filed. In these cases, the parties apparently went straight to an agreement to settle the class claims. In *Schwartz v. GE Capital Consumer Card Co.*,<sup>25</sup> for example, the representative plaintiff, holder of a credit card account, sued the issuing bank for sending a periodic billing statement that disclosed the daily percentage rate but failed to disclose a corresponding annual percentage rate, contrary to the Truth in Lending Act.<sup>26</sup> No motions to certify or address the merits were docketed. After a settlement conference with the magistrate judge (hearing the case by consent), the parties moved for preliminary and final approval of a class settlement. The court preliminarily certified a settlement class, and later finally approved the terms of the settlement. The representative plaintiff received a \$2,500 incentive award; a \$295,000 settlement fund was set aside for the class; and class counsel received a fee of \$70,000. In the end, awards of \$70.94 were sent to the 4,158 class members who submitted valid claims.

Cases like *Schwartz* should be considered with the cases in which a motion was filed but the court never ruled in favor of a contested motion. Together, 23 out of 35 total class settlements in the removed cases, 65.7%, were cases without a favorable ruling for class settlement. Overall, in the removed cases, class settlement was the outcome in 35 out of 297 cases, or 11.8%. (These cases constitute a larger percentage of the non-remanded cases, of course, which total 17.4%.) Calculating the 95% confidence interval for this proportion yields a margin of error of 3.7%, so we estimate that the actual proportion of class settlements among removed federal question class actions in the study period is between 8.1% and 15.5%. In the entire population in the four-year study period, then, we would expect to find between 75 and 144 class settlements in removed class actions based on federal question jurisdiction, with a point estimate of 109.

### *B. Original Proceedings*

Figure 2 presents a flowchart illustrating the class certification and settlement activity in the 457 federal question class actions sampled as original proceedings in federal court during the study period. Civil rights actions, including employment discrimination, were the most common nature of suit category. A motion to certify a litigation class—that is, a contested motion for class certification—was filed in

25. *Schwartz v. GE Capital Consumer Card Co.*, No. CV-06-0394 (JMA) (E.D.N.Y. Jan. 30, 2006) (declaration of L. Stephens Tilghman regarding mailing of distribution checks).

26. Truth in Lending Act, 15 U.S.C. § 1601 (2006).



just over one-third, or 35.2%, of these cases. In almost two-thirds of the federal question original proceedings, no motion for class certification was ever filed. The most common outcome in these cases was voluntary dismissal, which may indicate an individual settlement, as discussed above.<sup>27</sup>

At least one contested motion was granted in 36.6% of the cases in which such motions were filed, 59 out of 161. No contested motion to certify was granted in 63.4% of the cases in which such a motion was filed. As discussed above, this does not mean that all contested motions to certify filed in a given case were denied. Indeed, in nineteen of these cases, or 18.6%, the court approved a motion for preliminary approval of a settlement class after the filing of a contested motion but without ever acting on a contested motion. It is worth noting that the median time to decision for contested motions for class certification among the original proceedings was 3.9 months, which means that the parties had time to negotiate settlements during the pendency of the motions.

In the 296 proposed class actions in which no contested motion for class certification was ever filed, class settlements resulted in 22 cases, or 7.4% of the time. For example, in *Butler v. Santa Cruz County*,<sup>28</sup> plaintiff sued on behalf of a class of pretrial detainees who had been incarcerated in the county jail and who were strip searched either before arraignment or after a court had ordered their release from detention. There was no motion for class certification, nor was there any motion directed at the merits of the complaint. More than one year after a referral to mediation, the parties jointly moved for preliminary approval of a class settlement. The court granted its approval, implicitly certified a class, and authorized that notice be sent to the proposed class. The gross amount of the settlement was \$3,875,000, with \$2,600,000 to be paid to the class; \$75,000 to the class representative; \$950,000 to be paid to the attorneys for fees and costs; and \$250,000 allocated to an administration fund. Class members were entitled to receive between \$750 and \$3,000, depending on the number of searches and the type of alleged crime. Notices were sent to 3,487 class members and 856 claims had been received as of the date of the final approval order.

Similarly, plaintiffs in *Brower v. Financial Crimes Services LLC*<sup>29</sup> filed a class action for damages, declaratory judgment, and injunctive

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27. See *Preliminary Findings*, *supra* note 12 and accompanying text.

28. *Butler v. Santa Cruz Cnty.*, No. 5:07-cv-941-JF (N.D. Cal. Feb. 14, 2007) (class action complaint).

29. *Brower v. Fin. Crimes Serv., LLC*, No. 06-CV-4237 FLN (D. Minn. Oct. 19, 2006) (order granting final approval of class settlement and dismissal of the defendants).

relief on behalf of a class of consumers who either (1) received a letter from defendant in an envelope with the name “Worthless Check Diversion Program” in the upper left corner or (2) received a letter from the defendant falsely stating that it is a “licensed debt collector.” Defendant initially moved to dismiss and for summary judgment but withdrew the motions and agreed to a settlement. The court preliminarily certified the proposed Rule 23(b)(3) classes for settlement only, about six months after the case was filed, and then finally approved a settlement with these terms: distribution of \$20 each to 390 class members for a total of \$7,800, payment of \$1,000 to the named plaintiff, and an award of \$11,000 in attorney fees.

Cases like *Butler* and *Brower* are among the nineteen cases in which a class settlement occurred without a favorable ruling on class certification. Of all class settlements in the federal question original proceedings, slightly more than half, 53.9%, occurred in cases without a favorable ruling on class certification. Still, class settlement is a likely outcome after certification of a litigation class. Consider *Bruce v. Wells Fargo Bank NA*.<sup>30</sup> Plaintiff, an individual who received a solicitation from the defendant bank, alleged that the bank accessed his credit history without his consent and without presenting a “firm offer of credit,” in violation of the Fair Credit Reporting Act (FCRA).<sup>31</sup> The court granted defendant’s motion for dismissal of one count, but the FCRA claim was not included in the motion. Plaintiff moved for certification of a Rule 23(b)(3) class, which the court granted. The class was defined as all recipients of a solicitation like that received by plaintiff who did not receive credit from the defendant. The plaintiff, with the court’s agreement, limited the class to an estimated 40,000–60,000 residents of Lake and Porter counties in Indiana. Six months later the parties moved for approval of a class settlement. The proposal, which the court initially approved, provided for payment of \$1,000 to the named plaintiff, \$200 to each class member who submitted a valid claim form, and \$75,000 in fees to class counsel. A motion for final approval indicated that notice had been sent to 4,377 class members (200 of which were undeliverable), generating 1,525 claims and a total payout of \$305,000. No explanation was found for the shrinkage of the class from 40,000 to 4,377. The court approved the class settlement as described.

As seen in Figure 2, class settlement was the outcome in 16.6% of the federal question original proceedings. Calculating the 95%

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30. *Bruce v. Wells Fargo Bank, N.A.*, No. 2:5cv243 (N.D. Ind. June 20, 2005) (final approval order).

31. Fair Credit Reporting Act, 15 U.S.C. § 1681 (2006).

confidence interval for this proportion yields a margin of error of 3.4%, so we estimate that the actual proportion of class settlements among federal question class actions initially filed in federal court in the study period is between 13.2% and 20%. In the entire population in the four-year study period, then, we would expect to find between 693 and 1,050 class settlements in removed class actions based on federal question jurisdiction, with a point estimate of 870.

Together with the findings on removal class actions, this suggests an estimate of class settlements, in non-securities federal question cases, of around 1,000 for the four-year study period, or around 250 per year. This estimate appears comparable with Professor Fitzpatrick's findings in his recent study of class settlement. Fitzpatrick found 304 class settlements in 2006 and 384 in 2007;<sup>32</sup> however, his study included all class settlements, including securities settlements, which represented the most common category,<sup>33</sup> and diversity class settlements, which likely represent a small number in any given year.<sup>34</sup> Our estimates are certainly not inconsistent with somewhere around 400 class settlements in the federal courts in any given year in the last decade.

Perhaps the most striking finding in Figure 2 is that, in cases in which one or more contested motion for class settlement was granted, a class settlement resulted in just 57.6% of cases. Given the conventional wisdom that the denial of a motion to certify signals the death knell for a proposed plaintiff class and the grant of a motion to certify a litigation class forces the defendant to settle,<sup>35</sup> we expected this figure to be much higher. As discussed in the removals section, however, there are several possible outcomes for cases in which a litigation class is certified. The defendants may prevail, for example, at summary judgment or at trial. The litigation class may be overruled on a Rule 23(f) appeal.<sup>36</sup>

Another possible outcome is decertification of a certified litigation

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32. See *Empirical Study*, *supra* note 7, at 818 tab. 1.

33. See *id.* (showing securities class settlements accounting for 40% of class settlements in 2006 and 35% in 2007).

34. See *id.* at 818–19 (“[T]here were almost no mass tort class actions . . . settled over the two-year period.”). Of course, diversity class settlements need not be “mass tort” settlements.

35. See, for example, Judge Easterbrook's opinion in *Blair v. Equifax Check Serv., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (“[A] grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight. Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere.”). Of course, the sampled cases may not have been, in any sense, “bet the company” type cases.

36. Interestingly, *Blair*, 181 F.3d 832 was the Seventh Circuit's first case involving Rule 23(f). For a summary of empirical studies of Rule 23(f), see *Consolidations*, *supra* note 8, at 783.

class. For example, in *Thompson v. Linvatec Corp.*,<sup>37</sup> an ERISA action, the court initially certified a litigation class on May 22, 2007. The plaintiff class alleged that the employer had violated sales representatives' contractual right to severance benefits after acquisition by another company. The defendants moved for reconsideration, claiming that the district court had not followed Second Circuit's precedent, specifically *In re Initial Public Offering Securities Litigation*.<sup>38</sup> The district court disagreed, but in a subsequent order, issued June 22, 2010, it found that the plaintiff class no longer met the numerosity requirement for class certification. Specifically, the court found that too few sales representatives remained in the class. In addition to decertifying the class, the court granted the defendant's motion for summary judgment, terminating the case.

Even reaching a class settlement may not signal the "conclusion" of a case. Take the fascinating case of *Murray v. Indymac Bank FSB*.<sup>39</sup> The named plaintiff in *Murray* had received a solicitation for refinancing from the defendant bank. Plaintiff alleged that the bank accessed the credit histories of class members without consent and without presenting a "firm offer of credit," in violation of the Fair Credit Reporting Act (FCRA).<sup>40</sup> After the court denied defendant's motion for judgment on the pleadings, the parties proposed a class settlement, which the court preliminarily approved. The nationwide class was comprised of all persons to whom defendant or an affiliate mailed a prescreened offer of credit on or after November 24, 2002. The gross amount of the settlement was \$1,600,000, with approximately \$1,267,731 to be distributed to class members who submitted valid claims, \$330,000 awarded to class counsel, and \$3,000 to the named plaintiff. The motion for final approval indicated that notices had been mailed to 1,249,605 class members, of whom 11,421 submitted valid claims—to be paid \$110 each.

This was not the end of *Murray*, however. Within a week after the court entered final judgment, several individually represented class members filed a motion to vacate the judgment under Rule 60(b) on the grounds that they had not received notice of the proposed settlement. They alleged that class counsel and defendant agreed to limit the class notice to class members who had been mailed a

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37. Memorandum—Decision and Order, *Thompson v. Linvatec Corp.*, No. 6:06-cv-404 (NPM / GJD) (N.D.N.Y. Mar. 30, 2006).

38. *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d. Cir. 2006).

39. *Murray v. Indymac Bank, F.S.B.*, No. 04 C 7669 (N.D. Ill. Nov. 24, 2004) (memorandum opinion).

40. Fair Credit Reporting Act, 15 U.S.C. § 1681 (2006).

prescreened offer of credit between June 3 and June 27, 2005, a small portion of the class as originally defined, which perhaps explains why less than ten percent of the defined class filed claims. The court granted the motion and vacated its judgment approving the class settlement. Plaintiff, with leave of the court, filed an amended complaint that excluded the individually represented plaintiffs (apparently by limiting the proposed class to Illinois residents). They also limited the class to those that alleged willful violations of the FCRA. The court granted plaintiffs' motion to certify a class of Illinois residents who received a letter of solicitation from defendant. Plaintiffs estimated the size of the class to be 18,000 members. Cross motions for summary judgment followed, focusing on the element of willfulness. After initially granting plaintiff's motion, the court vacated its judgment to await the Supreme Court's decision in *Safeco Ins. Co. of America v. Burr*.<sup>41</sup> Based on that decision, the court granted defendant's motion for summary judgment. Plaintiff appealed, but the appeal was later dismissed with no indication of a settlement, class or otherwise. Thus the once-certified class of over a million members, and its lawyers, took home nothing.

### *C. Fair Labor Standards Act Collective Actions*

A number of cases in the study consisted of a collective action for damages pursuant to 29 U.S.C. Sec. 216(b) of the Fair Labor Standards Act (FLSA) and no other claim for relief. These actions differ from class actions under Rule 23 in several important ways, particularly regarding class certification. Because of these differences between class actions and FLSA collective actions, each type of case deserves separate analysis.

Section 216(b) explicitly authorizes such actions "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." The statutory authorization means that the parties do not have to satisfy the criteria of Rule 23 (a) and (b). Identifying other employees who are similarly situated is enough. These collective actions proceed by court-approved notice to the other employees, generally at an early stage of the proceedings. Only employees who file a written consent to become a party are included. In other words, these cases proceed as opt-in as opposed to opt-out cases. They are generally termed collective actions, not class actions.

There are a great many FLSA collective actions in the federal courts. The sample included 487 FLSA collective actions initially

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41. *Safeco Ins. Co. of Am. v. Burr*, 127 S. Ct. 2207 (2007).

filed in federal court. Out of that number, only 45, or 9.2%, resulted in a collective settlement of the claims raised in the complaint. It is difficult to tell from the docket records whether the individual cases settled, but it appears that many FLSA collective actions terminate very quickly after filing. This may indicate that a relatively high percentage of such cases result in an individual settlement of the plaintiff's wage-and-hour claims. In FLSA actions that did not result in a collective settlement, the median time from filing to termination was 7.3 months. By way of comparison, the median time from filing to termination in civil rights actions that did not result in a class settlement was 15.2 months. The next Part provides a brief discussion of time to termination.

Before turning to that topic, however, it may be useful to provide an example of an FLSA collective action that resulted in a collective settlement. *Crawford v. Lexington-Fayette Urban County*<sup>42</sup> was heavily litigated over a period of more than two years and settled on the eve of trial. The lawsuit was brought by corrections officers against the county government for violations of the Fair Labor Standards Act (FLSA) and wage-and-hour provisions of state law. The FLSA claims were brought as an opt-in collective action, but the state law claims were brought as an opt-out class action under Rule 23. (It is important to remember that FLSA opt-in and Rule 23 opt-out class actions are not mutually exclusive.) The court granted defendants' motion to dismiss the state law claims on the grounds of sovereign immunity, thereby mooting plaintiffs' motion to have the class and collective actions proceed simultaneously. The court granted plaintiffs' motion to conditionally certify the claims as a collective action and later granted plaintiffs' motions to create three subclasses: one dealing with all claims relating to meal breaks and the other two dealing with all claims brought by captains and lieutenants (who are arguably exempt from the FLSA). In total, 340 workers opted into the proceedings. Later, the court reviewed the conditional certification by ruling on defendants' motion to decertify the subclasses. This is a traditional two-tiered approach to FLSA collective actions: conditionally certifying a class is primarily for notice and does not require much more than claims that the parties worked for the same employer during the same period. The second tier, triggered by a motion to decertify, more closely examines the extent to which the claimants are similarly situated.<sup>43</sup> After careful examination of the meal break claims, the court denied the motion to

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42. *Crawford v. Lexington-Fayette Urban Cnty. Gov't*, No. 06-299-JBC (E.D. Ky. Sept. 13, 2006) (memorandum opinion and order).

43. *See, e.g., Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544 (6th Cir. 2006).

decertify that subclass. The court granted defendants' unopposed motion to decertify the captains and lieutenants subclasses. After further pretrial skirmishing, the parties announced a settlement which the court initially approved and then finally accepted. The settlement provided for the creation of a settlement fund for allocation of payment for uncompensated work during meal breaks to be divided among the 340 claimants who opted into the case. The court approved up to \$870,000 in attorney fees as well as injunctive relief in the form of changes to meal periods and other employment practices.

#### *D. Disposition Times*

Table 1 displays the median disposition times for several categories of cases included in the study. The following figures exclude FLSA collective actions.

Original filings that did not result in a class settlement terminated in the district court in a median of 281.5 days, or about 9.3 months. Class settlements in the original proceedings took a median time of 636 days, or about 20.9 months, to terminate in the district court.

For federal question removals, the median time to termination is different for cases remanded to state court, cases not remanded but not settled as class actions, and class settlements. The median time to termination in federal court for a case remanded to state court is 111 days, or about 3.7 months. The median time to termination for a case not remanded, but not resulting in a class settlement, is 300.5 days, or about 9.9 months. The median time to termination of a class settlement case was 746.5 days, or 24.6 months—just over two years.

## II. DISCUSSION

One hears much about the vanishing trial. Some also seem to expect the class action to disappear, or at least diminish in frequency. Recent federal statutes, Rule 23 changes, case law, and guides for judges all point toward raising the standards for class action certification and settlement. A partial list of examples of this phenomenon includes:

- Supreme Court rejection of class action settlements in *Amchem*<sup>44</sup> and *Ortiz*;<sup>45</sup>
- Congressional expansion of federal jurisdiction over diversity

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44. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

45. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

- cases in the Class Action Fairness Act of 2005;<sup>46</sup>
- Changes in Federal Rule of Civil Procedure 23 that opened up the opportunity for appellate review of class certification decisions, loosened the timing of class certification, and tightened the federal requirements for certifying classes;<sup>47</sup>
  - Federal Judicial Center publications such as the *Manual for Complex Litigation, Fourth*<sup>48</sup> and the pocket guide for judges on managing class action litigation<sup>49</sup> that translated the above changes into operational case management guidance;
  - Case law applying the Rule 23 changes that challenge class action plaintiffs to present clear and detailed trial plans and demand reliable expert evidence supporting claims for recovery on common elements of plaintiffs' claims for relief;<sup>50</sup>
  - Case law adding ascertainability of the class as a precondition to class certification;<sup>51</sup>
  - Contractual clauses designed to thwart class litigation and shunt potential class actions into arbitration forums where individual claims are to be resolved on a case-by-case basis, without any opportunity to aggregate claims;<sup>52</sup> and
  - Supreme Court rejection of class certification and articulation of standards for finding common question of law or fact in *Dukes v. Wal-Mart*.<sup>53</sup>

Such developments may have had the effect of shifting some aggregate litigation, such as products liability claims, to non-class settings, especially multidistrict litigation, and to non-class settlements.<sup>54</sup>

Of course, heightened standards for class certification may not affect filings and removals in the federal courts in a single direction. Heightened standards may deter plaintiffs' attorneys from filing in federal court and may encourage efforts to avoid removal to federal court. But defendants may seek to remove more cases from states in which the federal trend toward heightened standards has not prevailed. The expansion of federal jurisdiction as a result of CAFA has increased federal filings and removals, shifting diversity cases

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46. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

47. See *infra* text accompanying notes 68–76.

48. MANUAL FOR COMPLEX LITIGATION (FOURTH) (2004).

49. BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES (3d ed. 2010).

50. See *infra* text accompanying notes 77–97.

51. See *infra* text accompanying notes 98–101.

52. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

53. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

54. See generally Symposium, *Aggregate Justice: Perspectives 10 Years After Amchem and Ortiz*, 58 U. KAN. L. REV. 889 (2010).



from state to federal court. The overall impact of CAFA on the total, nationwide volume of class action filings is unknown, but there are some indications that class action filings in state courts have increased.<sup>55</sup> One might even speculate that a decreasing success rate, in terms of achieving class certification, may lead to the counter-intuitive result of more filings. After all, plaintiffs' attorneys need to win attorney fees in at least some number of cases to remain in business. If the chances of prevailing in any given action decrease, they may have to file more cases.

Whatever the national trends in filings and removals, it is clear that statistics on filings and removals are simply not the best available indicator of the condition of the class action today. As Part I explained, motions for class certification are not even filed in most proposed class actions filed in or removed to federal court. Filings data only go so far. In the remainder of this Article, we turn to previous studies of class certification and settlement to set the findings presented in Part I in context. But the key to remember is that there are few studies of class action certification and settlement in general. From 1966–2011, there were five studies, counting the present one, that shed light on the question, too few to conclude that class certification is in fact diminishing or disappearing. One is left with the distinct impression, however, that there has been a shift in practice. To that shift, we now turn.

### A. *The Changing Law of Class Actions*

Prior to 1966, Rule 23 defined categories of class actions in terms

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55. See, e.g., Gail E. Lees, et al, 2009: First Quarter Updates on Class Action Trends, 10 CLASS 399 (BNA) (April 24, 2009), available at <http://www.gibsondunn.com/publications/Documents> (“Gibson, Dunn & Crutcher class action lawyers report that state court class action activity in many courts has not diminished. CAFA has prompted a flurry of single state class actions filed in state courts”; “In Los Angeles alone, for example, class action filings have increased 55 percent in the last 3 years—from 516 filings in 2005 to 801 filings in 2008.”); see also SEYFARTH SHAW CLASS ACTION REPORT—2008 EDITION, available at [http://www.seyfarth.com/index.cfm/fuseaction/publications.publications\\_detail/object\\_id/375370ea-8813-4bb1-b964-5452548ad24a/SeyfarthShawClassActionReport2008Edition.cfm](http://www.seyfarth.com/index.cfm/fuseaction/publications.publications_detail/object_id/375370ea-8813-4bb1-b964-5452548ad24a/SeyfarthShawClassActionReport2008Edition.cfm) (concluding “While shareholder and securities class action filings experienced a slight uptick in 2007, employment-related class action filings increased significantly. Anecdotally, surveys of corporate counsel confirmed that workplace litigation – and especially class action and multi-plaintiff lawsuits – continues as the chief exposure driving corporate legal budget expenditures.”). But cf. Steven S. Gensler, *The Other Side of the CAFA Effect: An Empirical Analysis of Class Action Activity in the Oklahoma State Courts*, 58 KAN. L. REV. 809, 815 (2010) (finding “a significant reduction in class action filings in the Oklahoma state courts post-CAFA [and] a similar reduction in [federal court] class actions filings during this same period”); and Howard M. Erichson, *CAFA’s Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1609 (2008) (reporting class action filings in Madison County, Illinois—“a forum at which [CAFA] was unabashedly directed”—“dropped sharply when CAFA took effect”).

of the abstract nature of the rights involved.<sup>56</sup> In 1966, the Committee on Rules adopted fundamental changes to

Rule 23, but the 1966 amendments clearly contemplated that what we now call “mass torts”—even the single incident variety— were not expected to fall within the new rule.<sup>57</sup> The structure of the 1966 rule favored early class certification, even provisional certification, which effectively gives the benefit of any doubt to the class representatives. Rule 23(c)(1) directed that a court determine class status “as soon as practicable” after the complaint is filed. Committee notes in 1966 specified that an “order embodying a [class] determination may be conditional” and can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound.<sup>58</sup> For a Rule 23(b)(3) class to be certified, the court had to determine that the requirements of Rule 23(a) (numerosity, common questions of law or fact, typicality, and adequacy of representation) are met; that questions of law or fact common to class members predominate; and that a class action is superior to other available alternatives for fairly and efficiently adjudicating the controversy.

Professor Benjamin Kaplan, Reporter to the Advisory Committee on Civil Rules, anticipated controversy and urged a moratorium on revisiting the amendments until their workings could be fully assessed. Professor Kaplan stated, “It will take a generation or so before we can fully appreciate the scope, the virtues, and the vices of new Rule 23.”<sup>59</sup> As a measure of the esteem in which Professor Kaplan was held, the rule makers refrained from considering changes in Rule 23 for almost a generation.

Since the 1990s, the Federal Rules of Civil Procedure have been amended to make class certification more difficult; the likely effect of such amendments should be seen in a diminishing percentage of cases filed as class actions that result in class certification, whether for litigation or settlement. In May 1993 the Advisory Committee, following a recommendation by the Judicial Conference’s Ad Hoc

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56. FED. R. CIV. P. 23, Committee Note, 1966 Amendment, at “Difficulties with the original rule” (West 2010) (describing “the so-called ‘true’ category . . . defined as involving ‘joint, common, or secondary rights; the ‘hybrid’ category, as involving ‘several’ rights related to specific property; [and] the ‘spurious’ category, as involving ‘several’ rights affected by a common question and related to common relief.”).

57. *Id.* at subdiv. (b)(3) (stating that “A ‘mass accident’ resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.”).

58. *Id.* at subdiv. (c)(1).

59. Kaplan is quoted saying this in, among other places. HENSLER, *supra* note 4, at 35.

Committee on Asbestos Litigation,<sup>60</sup> considered a draft revision of Rule 23 for the first time since the 1960s.<sup>61</sup> The original proposal included numerous changes in Rules 23(a) and (b) and would have altered certification requirements to a considerable degree.<sup>62</sup> For example, the proposal would have expanded the criteria in Rule 23(a) to include a requirement for all class actions that the Rule 23 procedure be found superior to other available methods for the fair and efficient adjudication of the controversy. Rule 23(b) then listed a series of factors, mostly those specified in the (1), (2), and (3) subsections of current Rule 23(b), to be considered in determining superiority. Distinctions among (b)(1), (b)(2), and (b)(3) classes would have been eliminated.<sup>63</sup>

That proposal did not advance in its original form and was replaced by a proposal that would have retained the (b)(1), (b)(2), and (b)(3) classes and added subsections that would have expanded certification options to include settlement classes (including “claims that could not be litigated on a class basis”), opt-in classes (using “permissive joinder” as the rubric), and hybrid classes that would join claims for injunctive relief with claims for individual damages under opt-in, opt-out, or settlement class certification.<sup>64</sup> Factors to be considered in determining predominance and superiority of a (b)(3) class action would have included “the practical ability of individual class members to pursue their claims without class certification,” “the probable success on the merits of the class claims,” and whether the public and private benefits of class litigation would justify the burdens of the litigation—the “just ain’t worth it” clause.<sup>65</sup>

After publication in August 1996,<sup>66</sup> and following several well-attended, contentious public hearings and extensive committee debate, the Advisory Committee abandoned efforts to define rule-based factors that would guide district judges in deciding whether to certify a class. Committee consensus—the underpinning for most rulemaking activity in the judicial branch—was limited to approval of Rule 23(f), creating a permissive interlocutory appeal of a decision

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60. REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION (1991).

61. MINUTES, ADVISORY COMMITTEE ON CIVIL RULES 2 (May 3d–5th, 1993).

62. THOMAS E. WILLGING, LAURAL L. HOOPER & ROBERT J. NIEMIC, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES app. A (1996) [hereinafter FJC 1996 Study] (containing a copy of the 1993 proposal).

63. *Id.* at 96.

64. FJC 1996 Study, *supra* note 62, at app. B (containing November 1995 draft).

65. *Id.* at 101 (concerning Proposed Rule 23(b)(3) (A), (E), and (F), respectively).

66. The supporting materials can be found in *Proposed Rules*, 167 F.R.D. 535 (1996); the proposed amendments to Rule 23 at *id.* at 559.

granting or denying class certification.<sup>67</sup> The courts of appeals were given sole discretion to decide whether to grant such an appeal.<sup>68</sup>

In another procedural change expected to affect class certification, the committee changed the timing requirements for class certification motions. As noted above, Rule 23(c)(1) required a court to determine class status as soon as practicable after a class action complaint was filed. The committee simply changed the quoted language to “at an early practicable time,” loosening the timing of a district court’s attention to class certification. The practical effect is that a court could wait until the parties discovered enough information to fully litigate the question of whether a class qualifies for certification, including the question of whether plaintiffs could use class-wide proof, to support class claims. There was no longer the time pressure that might have compelled a court to certify a class conditionally, pending further development of the factual basis for such an order. As the Committee Notes makes abundantly clear, this seemingly minor change opened the door for parties and judges to explore the merits of an action before deciding whether to certify a class, an approach that had been technically, if not practically, restricted under some interpretations of *Eisen v. Carlisle & Jacqelin*.<sup>69</sup> The committee said:

[D]iscovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense, it is appropriate to conduct controlled discovery into the ‘merits,’ limited to those aspects relevant to making the certification decision on an informed basis.<sup>70</sup>

Although this change did not go into effect until 2003, the committee unanimously recommended it in 1997<sup>71</sup> only to have it rejected by the Standing Committee.<sup>72</sup>

Reinforcing the above change, the committee deleted from Rule 23(c)(1) the permission that a class certification “may be provisional.” Expressing the new approach, the committee stated

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67. FED. R. CIV. P. 23(f).

68. *Id.* at Committee Note, Subdivision (f), 1998 Amendments to Rule 23.

69. *Eisen v. Carlisle & Jacqelin*, 417 U.S. 156 (1974) (stating that there is nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action and holding that such a judicial inquiry into the merits may not be used to shift the costs of notifying the class to a defendant.). We say “practically” because it is hard to conceive that a judge would not pay any attention to the merits of a case before certifying a class.

70. FED. R. CIV. P. 23, Committee Note, Subdivision (c), ¶ 1, 2003 Amendments to Rule 23 West Ed. 2010).

71. MINUTES, ADVISORY COMMITTEE ON CIVIL RULES at “Rule 23(c)(1)” (May 1–2, 1997).

72. MINUTES, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 18–19 (June 19–20, 1997).

that “[a] court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met.”<sup>73</sup>

These procedural changes opened the door to a more restrictive approach to class certification. Empirical research documents, for example, indicate that courts of appeals applied Rule 23(f) in a manner that reversed class certification in more than half of the cases but affirmed class certification in around 20% of the cases.<sup>74</sup> In the course of these rulings, courts of appeals necessarily articulated new standards to govern class actions.

After 1995, notably absent from proposals to amend Rule 23 was any serious effort to change directly the certification requirements found in Rule 23(a) and (b).<sup>75</sup> The Committee instead adopted the two procedural mechanisms described above. The purpose of the change in Rule 23(c)(1) was to guide district courts in making more rigorous and unconditional decisions when faced with class certification motions, and the purpose of the addition of Rule 23(f) was to permit appellate courts to review class certification decision and create new standards to guide district court actions. Both changes likely had a substantial impact on class certification. A recent appellate case illustrates how the changes have evolved.

In *re Hydrogen Peroxide Antitrust Litigation*,<sup>76</sup> is perhaps the “leading case”<sup>77</sup> of a number of recent decisions by courts of appeals in a wide range of federal circuits<sup>78</sup> that have called for “rigorous analysis” of motions to certify a class under Rule 23.<sup>79</sup> Purchasers of hydrogen peroxide and other chemicals filed a class action complaint alleging conspiracy in restraint of trade against a number of chemical manufacturers. After extensive discovery and after denying a motion to dismiss for failure to state a claim for relief, the United States

73. FED R. CIV. P. 23, Committee Note, Subdivision (c), ¶ 1, 2003 Amendments to Rule 23 West Ed. 2010).

74. See Richard D. Freer, *Interlocutory Review of Class Certification Decisions: A Preliminary Empirical Study of Federal and State Experience*, 35 W. ST. U. L. REV. 13 (2007); Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277 (2008).

75. One proposed change would have collapsed subdivisions (b)(1), (2), and (3) into a single provision that would ask “whether a class action is superior for the fair and efficient adjudication of the controversy.” *Id.* The committee also considered whether to convert the opt-out form of Rule 23(b)(3) to an opt-in form. *Id.* at 4–6.

76. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008).

77. Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits of Class Certification*, 79 GEO. WASH. L. REV. 324, 351 (2011).

78. See, e.g., *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6 (1st Cir. 2008); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001).

79. The phrase “rigorous analysis” in the class certification context originated in the Supreme Court’s decision in *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982).

District Court for the Eastern District of Pennsylvania certified a class of direct purchasers spanning an eleven-year period.<sup>80</sup> Defendants petitioned the Third Circuit Court of Appeals to allow an interlocutory appeal under Rule 23(f). The court granted the petition, vacated the certification order, and remanded the case for further consideration of whether to certify a class.

The Third Circuit's comprehensive review of the certification order provided three primary points to guide district courts prior to certifying a litigation class. First, the appellate court held that a district court must make specific findings, "not merely a 'threshold showing' by a party, that each requirement of Rule 23 is met . . . by a preponderance of the evidence."<sup>81</sup> Second, the district court "must resolve all factual and legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action."<sup>82</sup> Finally, the court underscored the above points and made clear that they apply to disputes regarding "expert testimony, whether offered by a party seeking class certification or by a party opposing it."<sup>83</sup> Specifically, the court concluded that a ruling that plaintiff's proposed expert testimony satisfied the *Daubert* standard<sup>84</sup> was not enough when defendants disputed that testimony and proffered expert evidence in support of their position. "Weighing conflicting expert testimony at the certification stage is not only permissible, it may be integral to the rigorous analysis Rule 23 demands,"<sup>85</sup> the court held. This may involve resolving credibility issues concerning the expert witnesses' diverging approaches.<sup>86</sup> Though a court may find that resolving such a conflict is unnecessary, it may not refrain from resolving the

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80. *Hydrogen Peroxide*, 552 F.3d at 308.

81. *Id.* at 307.

82. *Id.*

83. *Id.*

84. Note that because the district court had ruled on *Daubert* issues and the appropriateness of a *Daubert* ruling was not the subject of the appeal, *Hydrogen Peroxide* does not directly resolve the question of whether *Daubert*-type review of expert testimony for reliability *must* be conducted before examining expert evidence at the certification stage (though the language of the opinion clearly point toward mandating *Daubert* screening). In *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, (9th Cir. 2010) (en banc), *cert. granted*, 131 S. Ct. 795 (2010), the Ninth Circuit ruled, 6–5, that a district court need not invoke *Daubert* procedures to test the reliability of expert testimony at the class certification stage. Wal-Mart was argued on March 29, 2011, and the Supreme Court may well weigh in on this issue before the end of the current term. But note also that the word "Daubert" was not used during oral argument. Transcript of Oral Argument, *Wal-Mart-Stores, Inc. v. Dukes*, No. 10-277 (Mar. 29, 2011). For further discussion of the *Daubert* issues, see Catherine A. Bernard, *Certification and Its Discontents: Rule 23 and the Role of Daubert*, CIRCUIT RIDER (Seventh Circuit Members Only, May 2011) (on file with the authors).

85. *Hydrogen Peroxide*, 552 F.3d at 323.

86. *Id.* at 324.

conflict simply “because of concern for an overlap with the merits.”<sup>87</sup> In *Dukes v. Wal-Mart*, the Supreme Court put to rest any cause for concern about examining the merits in a class certification decision.<sup>88</sup> The majority expressed doubt that *Daubert* does not apply to class certification rulings, but did not resolve the question.<sup>89</sup>

The Third Circuit found support for its approach in the 2003 amendments to Rule 23, specifically on the timing of certification and the deletion of the authority for conditional class certification.<sup>90</sup> Quoting from the Committee Note, the court focused the district court’s task on determining “how the case will be tried.”<sup>91</sup>

If *Daubert* represented a sea change in judicial responsibility for screening expert testimony, the line of cases illustrated by *Hydrogen Peroxide* represents a sea change on top of that change.<sup>92</sup> *Eisen* no longer restricts examination of the merits while deciding whether to certify a class. In resolving disputes about expert testimony, district courts may well end up resolving the central dispute in the litigation. In effect, these rulings may preempt any need for ruling on summary judgment. Insight into the scope of the change represented by cases like *Hydrogen Peroxide* can be found by comparing the most recent editions of the *Manual for Complex Litigation*. *The Manual for Complex Litigation, Third*, was published by the Federal Judicial Center in 1995 and largely written by its then director, United States District Judge William W. Schwarzer. The third edition repeats the *Eisen* mantra that “the court should not at this [class certification] stage assess the merits of the underlying claim(s).”<sup>93</sup> It allowed that “some discovery may be needed” to resolve class certification questions.<sup>94</sup> But nowhere in the thirteen pages devoted to class certification does the third edition refer to the recent decision in *Daubert* or any form of expert testimony.

*The Manual for Complex Litigation, Fourth*,<sup>95</sup> published in 2004

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87. *Id.*

88. *Dukes v. Wal-Mart*, 131 S. Ct. 2541, 2551 (2011) (stating that “‘rigorous analysis’” of class certification will “entail some overlap with the merits of plaintiff’s underlying claim. That cannot be helped.”).

89. *Id.* at 2554.

90. *Hydrogen Peroxide*, 552 F.3d at 318–19.

91. *Id.* at 319.

92. For a thorough discussion of the judicial role in screening expert testimony at the class certification stage, see Marcus, *supra* note 77.

93. MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.11 (1995). It is interesting to note that the court in *Hydrogen Peroxide* cited that section of the Manual for the proposition that a court must make all relevant inquiries and consider all relevant evidence and argument presented by the parties. *Hydrogen Peroxide*, 552 F.3d at 307.

94. MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.11 (1995).

95. MANUAL FOR COMPLEX LITIGATION (FOURTH) (2004)..

(approximately eleven years after *Daubert*), gives guidance to judges considering class certification motions:

Expert witnesses play a limited role in class certification hearings . . . . The judge need not decide at the certification stage whether such expert testimony satisfies standards for admissibility at trial. Courts have applied a high threshold for assessing the need for expert testimony at the certification stage. A judge should not be drawn prematurely into a battle of competing experts.<sup>96</sup>

For the first time, the MCL, 4th discussed the possibility that expert witnesses testimony may be relevant to the class certification decision but urged a cautious approach, expressly stated that the judge “need not decide at the certification stage” the admissibility of such evidence and that courts should apply “a high threshold for assessing the need for expert testimony at the certification stage.” Four years later, the *Hydrogen Peroxide* court of appeals directed the district court to examine and decide the admissibility of expert evidence, at least to the extent that it was relevant to class certification. How quickly seas change.

Without exploring this subject in detail, it appears that judicial additions of an ascertainability requirement to Rule 23 have increased pressure on class certification. Professor Miriam Gilles documents the emergence of this phenomenon, and concludes:<sup>97</sup>

And yet that is the story of small-claims consumer class litigation over the past decade, as federal district courts have repeatedly declined to certify class actions on grounds that are specific to small-claims consumer cases. Foremost among those grounds is the notion that the federal class action rule carries within it an implicit requirement of “ascertainability.” More specifically, courts have held that in order to certify a class, the identity of class members must be sufficiently ascertainable to ensure the efficacy of a subsequent distribution of damages. In practice, what this shadow standard of ascertainability has come to mean is that no matter how clear the evidence of wrongdoing, plaintiffs have no redress in the typical consumer case involving small retail transactions.<sup>98</sup>

*The Manual for Complex Litigation, Fourth*, may have set the stage for expansion of the concept of ascertainability in its repeated

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96. *Id.* § 21.2, 267–68 (citing *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001) (“[A] district court may not weigh conflicting expert evidence or engage in ‘statistical dueling’ of experts” at the class certification stage.)).

97. Miriam Gilles, *Class Dismissed: Contemporary Judicial Hostility To Small-Claims Consumer Class Actions* (Benjamin N. Cardozo Sch. of Law Jacob Burns Inst. for Advanced Legal Studies, Working Paper No. 278, 2009), available at <http://ssrn.com/abstract=1499402>.

98. *Id.* at 3–4.



assertions that the class “definition must be precise, objective, and presently ascertainable” and that “Rule 23(b)(3) actions require a class definition that will permit identification of individual class members.”<sup>99</sup> The FJC’s “Pocket Guide for Judges” echoes the same guidance for judges in defining classes.<sup>100</sup>

Finally, the Supreme Court’s decision in *Dukes v. Wal-Mart*<sup>101</sup> deserves some comment despite the fact that it did not apply during the period of the studies discussed and could not have any direct impact on any of the studies discussed below. The impact of the *Dukes* decision is difficult to predict, but attempts to identify some of the factors that might be involved in hypothesizing the direction of class action filing and certification after *Dukes* seems instructive about some of the factors that may already be in play. On its face, the majority’s holding in *Dukes* that allegations of nationwide gender discrimination by a corporate entity with numerous stores, regional offices, and decentralized personnel decision-making did not present a single common issue of law or fact under Rule 23(a)(2) might be seen as imposing a chokehold on filing and certification. According to the dissent, this interpretation of Rule 23(a)(2), unsupported by the findings of the district court, was “far reaching” because the approach would be applicable to (b)(1) and (b)(2) proposed classes as well.<sup>102</sup>

Nonetheless, the dynamics of class action litigation and the resourcefulness of class actions attorneys might shift the impact in a different direction. Litigants might reframe their claims for filing and certification in state courts that have more expansive interpretations of class certification standards. Under the Supreme Court’s decision in *Smith v. Bayer*,<sup>103</sup> states are free to interpret their class action rules independently of federal interpretations of Rule 23. Even in federal court, the *Dukes* decision might have little impact of filing and certification because the case itself is an outlier and hence distinguishable from a case that does not involve gender discrimination claims on behalf of 1.5 million potential class members allegedly harmed by millions of decisions made by thousands of corporate managers in 3,400 stores spread among fifty states. As these brief speculations suggest, abstract, rule-based class certification standards are not the only factors driving the rate of class certification. Even for the cases in which class certification is

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99. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.222 (2004).

100. Rothstein & Willging, *supra* note 49, at 9–10.

101. *Dukes v. Wal-Mart Stores, Inc.*, 131 S. Ct. 2541 (2011).

102. *Id.* at 2566 (Ginsburg, J., dissenting).

103. *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011).

litigated fully—a minority of those we have examined—litigants retain options for working within and around the rules.

### *B. Prior Studies*

In this subpart, we briefly compare the findings presented in Part I to prior studies of class actions in the federal courts. There have been very few empirical studies of class actions in general, and thus we are limited to comparing and contrasting. With only five such studies,<sup>104</sup> we cannot make any statements about trends.

First, let us describe briefly the contours of the other four studies.

#### 1. Georgetown Study

Editors at the Georgetown Law Journal examined docket records and case documents in all proposed Rule 23(b)(3) class actions filed in the United States District Court for the District of Columbia between July 1, 1966, and December 31, 1972. At the time of their report in 1974, 81 of 120 cases were terminated.<sup>105</sup>

#### 2. Federal Judicial Center Study 1

FJC researchers examined all cases filed as Rule 23 class actions that had been terminated in four federal district courts (Northern District of California (San Francisco), Southern District of Florida (Miami), North District of Illinois (Chicago), and Eastern District of Pennsylvania (Philadelphia), for a total of 407 cases. Researchers examined docket reports and case documents. The study included diversity and federal question cases and encompassed all types of Rule 23(b) actions.<sup>106</sup>

#### 3. Federal Judicial Center Study 2

FJC researchers surveyed a sample of attorneys who represented

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104. Another study examines certification in the context of class action litigation involving insurance companies, but the study does not distinguish between certification for purposes of litigation or settlement and therefore does not present findings that are comparable to the other five studies. See NICHOLAS M. PACE ET AL., *INSURANCE CLASS ACTIONS IN THE UNITED STATES* 41 (2007).

105. Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123 (1974).

106. Thomas E. Willging, Loral L. Hooper & Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74 (1996). The Federal Judicial Center published an earlier version of the same study, with complete tables and figures. *EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS* (1996), available at [http://www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/\\$file/rule23.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/$file/rule23.pdf).

plaintiffs and defendants in diversity and federal question class actions that had terminated between July 1, 1999, and December 31, 2002. There were 728 attorney responses in 621 of 1,418 cases in the sample. The report was based entirely on attorney responses to the FJC questionnaire.<sup>107</sup>

#### 4. Federal Judicial Center Study 3<sup>108</sup>

FJC researchers examined electronic docket records in a sample of 254 diversity class actions filed in or removed to federal courts between February 18, 2003, and February 17, 2005 that had terminated at the time of the report in 2008. Of the 254 cases in the original sample, 231 were terminated and the other 23 were pending.<sup>109</sup>

The first column in Table 2 presents the percentage of proposed class actions in each of the five studies in which one or more motions to certify litigation class was filed.<sup>110</sup> Note that cases examined in the first three studies were litigated under the as soon as practicable version of Rule 23(c)(1),<sup>111</sup> while cases in the current study and FJC Study 3 were litigated under the contemporary early practicable time version of Rule 23. Thus, we conclude that the proportion of class actions in which a motion was actually filed would be higher in the earlier studies than in the later ones. The studies are consistent with our guess. The 1992–1994 study observed the highest percentage of cases in which motions to certify a litigation class were filed, with more than two-thirds of cases identified as class actions with such a motion. The much-earlier Georgetown study found 51% of cases filed as class actions in the years immediately following the 1966 amendments included such a motion. In the last available study prior to the rule change, the observed proportion was 43%. The two studies post-amendment found lower proportions of cases with a contested motion for class certification, in the range of 24% to 35%.

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107. Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591 (2006). The Federal Judicial Center published an earlier version of the same study. AN EMPIRICAL EXAMINATION OF ATTORNEYS' CHOICE OF FORUM IN CLASS ACTION LITIGATION (2005) [hereinafter FJC STUDY 2], available at [http://www.fjc.gov/public/pdf.nsf/lookup/clact05.pdf/\\$file/clact05.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/clact05.pdf/$file/clact05.pdf).

108. *Preliminary Findings*, *supra* note 12.

109. *Id.* at 215.

110. All of these studies, except FJC STUDY 2, *supra* note 107, were based on information extracted from docket records in terminated cases. FJC STUDY 2 was based on attorney responses to a questionnaire about a recently terminated case. The FJC Pre-CAFA study included a small number of pending cases.

111. See *supra* notes 69–72 and accompanying text (regarding 2003 amendments).

Although we cannot say that the differences in the studies represent a change due to the amendment itself, the observations are not inconsistent with the assertion that moving the decision to certify a class to later in the case results in a lower proportion of cases with a motion. Motions to certify continue to be litigated in a substantial percentage of class action cases, but probably not as frequently as in prior decades.

The second column in Table 2 shows the percentage of class settlements in each study that occurred after the certification of a litigation class. The denominator, in other words, is the total number of class settlements, not the number of class actions filed. In the first two studies, 89% and 61%, respectively, of the final settlements took place after certification of a litigation class. In the current study, twelve of 35 settlements in the removed cases (34%) and thirty-five of 76 settlements in cases filed originally in federal court (46%) occurred in cases in which the court had previously certified a litigation class. In the pre-CAFA diversity class actions, the comparable proportion was 20%, and in the 1999–2002 FJC survey, the proportion was 42%. Interestingly, these last three studies, while hardly presenting a united front, suggest that the importance of the certification of a litigation class has waned in terms of being a precondition of class settlement.

In the era immediately following the 1966 amendments, it is very likely that the litigation class was the stock item and the settlement class was the rare bird. Though settlement classes became more acceptable by the 1990s, a majority of settlements were preceded by certification of litigation classes. In the modern era, roughly the last decade, fewer than half of the settlements completed the litigation class process.<sup>112</sup> Yet, as discussed above, certification as a litigation class does not necessarily guarantee a class settlement. The third column in Table 2 shows the percentage of certified litigation classes in each study that resulted in a class settlement. In the current study, 25% of the removed cases certified as classes and 42% of the original proceedings so certified did not result in a class settlement. Before empirical studies clarified the point, the conventional wisdom was that all certified class actions settled. In the 1994 FJC study, FJC researchers found that certified class actions that survived motions to dismiss and motions for summary judgment generally settled. In the study based on 1999–2002 data, FJC researchers concluded, “almost all certified class actions settle.”<sup>113</sup> Our current study shows similar

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112. Note again that the pre-CAFA study presents preliminary information that may change as cases pending at the time of the study result in settlement. See *supra* text accompanying note 109.

113. Willging & Wheatman, *supra* note 107, at 32.

results for federal question cases removed from state courts (75%), but a lower percentage (58%) of original proceedings with certified classes leading to a class settlement. The latter percentage represents the low point of the four studies that considered the relationship between certification of a litigation and eventual settlement. In other words, as we show, certified classes may yet end up being dismissed on motion, decertified, or reversed on appeal.

### CONCLUSION

The obvious question is, what do the findings presented in this paper tell policymakers—which in this context includes the Supreme Court, committees of the Judicial Conference and the Congress—about the present state of the class action in the federal courts? At a minimum, these findings suggest that, despite many of the changes in the law of the class action outlined in Part II, class actions are still being filed and, more significantly, classes are still being certified in the federal courts. A relatively small percentage of proposed class actions result in class settlement. Certification of a litigation class often means class settlement; but the findings presented in Part I should remind everyone that the certification of a litigation class does not, in every case, end the litigation. The lack of comparable studies over the last four decades makes it impossible to do more than speculate about trends. But these findings invite the speculation, however, that there has been a decline in class certification.<sup>114</sup> There is much room for additional research into class actions.

But to a great extent, class actions are a moving target for research. The Supreme Court continues to decide important cases in this area. The lower courts continue to apply these new precedents and to interpret CAFA. There has been at least one congressional hearing on class actions this year (in 2012).<sup>115</sup> And, notably, the Civil Rules Committee has placed class actions back on its agenda. The January 2012 Standing Committee meeting featured a panel discussion of class actions,<sup>116</sup> and the topic was discussed at length at the March

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114. Cf. Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=2038985> (citing similar developments in the legal environment and concluding that, in many areas, the class action is no longer viable).

115. The hearing, before the House of Representatives Subcommittee on the Constitution, was held June 1, 2012. See *Hearing on: Class Action Seven Years After the Class Action Fairness Act*, COMMITTEE ON JUDICIARY, [http://judiciary.house.gov/hearings/Hearings%202012/hear\\_06012012.html](http://judiciary.house.gov/hearings/Hearings%202012/hear_06012012.html) (last visited June 8, 2012).

116. *Agenda*, COMMITTEE ON RULES PRAC. & PROC. 227 (Jan. 5–6, 2012), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2012-01.pdf#pagemode=bookmarks>.

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2012 meeting of the Civil Rules Committee.<sup>117</sup> It is anyone's guess what direction these renewed discussions will take. But what is clear is that the subject is not going to go away. The class actions wars continue.

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117. *Agenda*, COMMITTEE ON RULES PRAC. & PROC. 449 (Mar. 22–33, 2012), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-03.pdf>.

TABLE 1: CASE PROCESSING TIMES

Category	Median (months)	N
Original proceedings		
Class settlements	20.9	71
Not class settlements	9.3	352
Removals		
Remands	3.7	95
Class settlements	24.6	32
Not class settlements	9.9	35

TABLE 2: COMPARISON OF CLASS ACTION STUDIES

Study	Percentage of cases with motion to certify a litigation class	Certified litigation classes as a percentage of class settlements	Percentage of certified litigation classes resulting in class settlement
Georgetown Study—1966–72	51	89	—
FJC Study—1992–94	70	61	62, 71, 88, 100
FJC Study 2—1999–2002	43	42	77
FJC Pre-CAFA Study—2003–05	24	20	100
Present Study—2003–07	31, 35	34, 46	58, 75



FIGURE 1

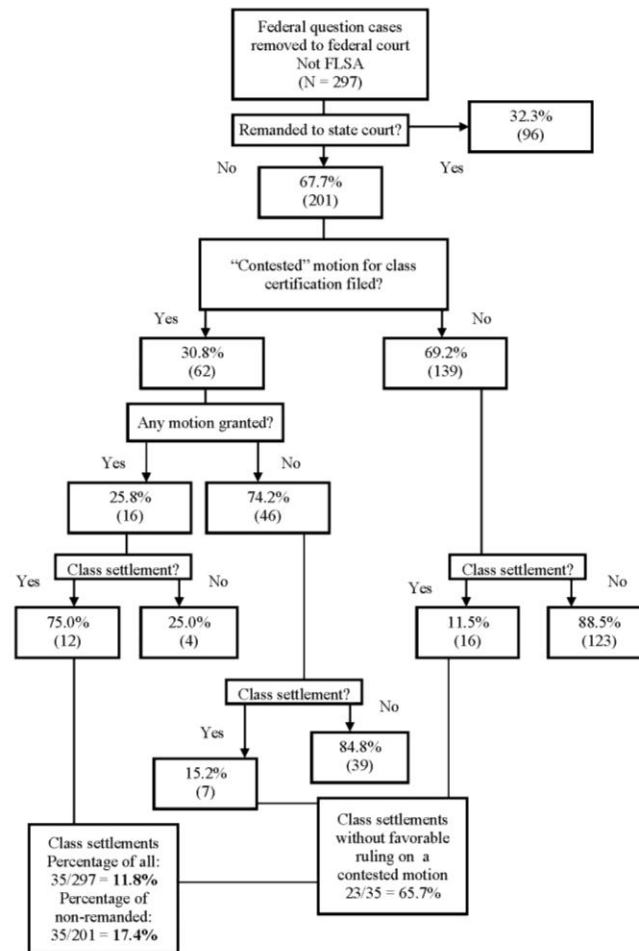


FIGURE 2

